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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>AARON LEVART SMART,<br><br>Defendant and Appellant. | B213565<br><br>(Los Angeles County<br>Super. Ct. No. BA289477) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Kathleen Kennedy-Powell, Judge. Affirmed.

Landra E. Rosenthal, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Aaron Levart Smart of the first degree murder of Lance Brodis, with true findings on street gang and firearms enhancements. Appellant was sentenced to 50 years to life in prison.[1] At the time of the crime, appellant was 15 years old and Brodis was 16 years old.

Appellant contends that (1) the trial court should have instructed sua sponte on the lesser included offense of voluntary manslaughter based on provocation, and (2) the trial court should have instructed that a driveby shooting could be second degree murder and did not necessarily have to be first degree murder.

We find no error and affirm.

## FACTS

### *1. Events Prior to the Shooting*

*A. Background*

Appellant was an active member of a Blood street gang called the Black P. Stones (the P. Stones).[2] The Rollin' 40's Crips (the Rollin' 40's) was a major rival of the P. Stones. The shooting occurred shortly after a fight between the two gangs. In the opinion of a gang expert, it occurred to benefit the P. Stones. Important testimony was provided by appellant's close friend Ebony M., a teenage girl who spent time with gang members in her neighborhood but did not participate in the gang's criminal activities. Ebony did not want to testify and did so under compulsion by the court.

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[1] At the sentencing hearing, the trial court observed that the true finding on the gang enhancement had the sole effect of "a parole advisement enhancement." The court was apparently referring to Penal Code section 186.22, subdivision (b)(5), which provides that in the case "of a felony punishable by imprisonment in the state prison for life," a person who violates subdivision (b) "shall not be paroled until a minimum of 15 calendar years have been served."

Further statutory references are to the Penal Code unless otherwise stated.

[2] The appellate record and the briefs contain multiple spellings of the name of appellant's gang. We use the spelling that appears in appellant's briefs.

*B. Ebony's Testimony*

Ebony testified that shortly after 3:00 p.m. on June 8, 2005, she was on a bus that was traveling south on Crenshaw Boulevard. She was accompanied by appellant, two other boys from his gang, and three other girls. When the bus reached the intersection of Crenshaw Boulevard and Stocker Street (the intersection), she saw about seven people standing on the northeast corner. Some of the people were displaying the hand sign of the Rollin' 40's. Ebony was acquainted with some of them and knew they were members of the Rollin' 40's. She testified that one of the people throwing the hand sign was Brodis, but she did not know if he actually was a gang member.

The people who were with Ebony on the bus responded by displaying the hand sign of the P. Stones out of the bus window. The entire group got off the bus at the next stop and walked back toward the intersection. Ebony had a scooter, and her companions did not, so she was the first to arrive at the intersection. She knew that appellant and his friends intended a gang confrontation. She told her acquaintances in the Rollin' 40's that they should leave the intersection and not risk their lives by being there. They were "hyped up" about the prospect of a gang fight, and refused to leave.

Appellant and his two male P. Stones companions arrived at the intersection and engaged in a verbal dispute with the members of the Rollin' 40's. The Rollin' 40's members ran to a parking lot near a bank. More members of their gang arrived. The rival gang members fought with each other. There was arguing, pushing, shoving, punching and kicking. One of appellant's male companions displayed a gun, and people ran off. Ebony, appellant and their group went to another parking lot and used cell phones to call friends. Their group got bigger. Someone drove up alone in a small white car. Some members of their group got into it, and it drove out of the parking lot. Appellant was no longer with Ebony. She got on a bus with some of her friends and went to another location where members of the P. Stones regularly congregated.

During cross-examination, Ebony added additional facts about the argument at the intersection. She explained that at some point prior to that confrontation, she and appellant had a close friend named "Marcell" who was murdered. Marcell used to "hang

out" with the P. Stones. The "word on the street" was that Marcell was killed by members of another rival gang, 18th Street. During the verbal argument before the fight, members of the Rollin' 40's taunted appellant about Marcell. They told him they killed Marcell, and said, "You all can't do nothin' about it." Ebony did not know the names of the Rollin' 40's gang members who engaged in the taunting. We infer that Brodis was not one of them, as Ebony did not know whether Brodis was a gang member.

*C. Ebony's Prior Statements About Events Prior to the Shooting*

Before the trial, during interviews with investigators, Ebony provided certain facts that were more damaging to appellant than Ebony's trial testimony. For example, Ebony testified that on the morning of the gang confrontation, an older member of appellant's gang told her that appellant was carrying a gun around. In contrast, prior to the trial Ebony specifically said that she saw appellant with a gun when he got off the bus to approach the intersection. Similarly, Ebony testified that she did not see appellant with a gun during the fight with the rival gang, but she said prior to the trial that appellant pulled out the gun and waved it around during the fight. Also, Ebony testified that she did not see appellant get into the white car, but she told investigators that appellant got into the car with other members of the P. Stones and left with them to follow the rival gang members who had left the area.

*D. Testimony of Officer Rainey*

Just before the gang confrontation at the intersection, Officer Rainey was in an unmarked car nearby, conducting undercover surveillance of the P. Stones. Rainey observed a loud argument between a female juvenile and a male juvenile who was dressed in typical Crips clothing. It therefore appears that Rainey witnessed Ebony's attempt to get the Rollin' 40's gang members to leave. As Rainey watched, appellant and his two male companions walked up very rapidly. Appellant was wearing a white shirt, blue jeans and white shoes. His companions wore the typical red clothing of the P. Stones. Rainey heard one of appellant's companions say something derogatory to the person with whom Ebony was arguing. Appellant then made a hand motion that looked like he was pulling something out of his pocket. One of his companions told him, "Don't

pull it out yet, Blood, don't pull it out." Rainey believed appellant had a handgun. He radioed for backup officers. The person with whom Ebony was arguing ran away. Appellant and his two companions chased him. The group moved out of Rainey's view. He saw a white Toyota Corolla compact car enter a parking lot where some of the people had gone. Three or four people, including appellant and one of his male companions, got into the Toyota. The white car drove out of the parking lot, and Rainey lost sight of it. About five minutes later, while he was driving around looking for it, he heard on a radio broadcast that shots had been fired and a victim was down. When he was subsequently shown a six-pack photo lineup (six-pack), he identified appellant as the person he believed had a gun at the intersection.

On cross-examination, Officer Rainey added that hostile interactions between the P. Stones and the Rollin' 40's could include taunts about a gang's failure to avenge the killing of one of its members.

***2. The Shooting of Brodis***

Brian G., testified that he walked after school to the liquor store on the southwest corner of the intersection. Brodis was a close friend of his from school. Neither he nor Brodis were gang members. He saw Brodis standing on the southeast corner of the intersection with a teenage boy he did not know, whom we will call Brodis's friend.[3] He crossed the street and joined Brodis and Brodis's friend. After talking briefly, the trio crossed to the northeast corner and walked east on Stocker Street to a nearby market. Brian and Brodis's friend went into the market while Brodis waited outside. Brian bought candy inside the market, walked out of it with Brodis's friend, and talked with the two boys on the sidewalk. Brodis was standing "on the outside."

A small white car pulled out of a nearby alley and turned onto Stocker Street toward the three boys on the sidewalk. An unidentified person was driving. Appellant was in the front passenger's seat. Brian knew appellant, as they were in an afterschool

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[3] The police interviewed Brodis's friend after the shooting but thereafter could not find him again.

program together at their middle school. Brian took his eyes off the car when it pulled out of the alley. He heard a single loud gunshot. He verified that he himself had not been shot and then looked quickly at the car, which was about 12 feet away. He saw a hand with a gun and appellant, the person in the passenger seat who fired the gun. The car sped away. Brodis fell to the pavement with a bullet in his chest. The police soon arrived. Brian described the car to them. In addition to identifying appellant at the trial, he identified him at the preliminary hearing and picked out his photo from a six-pack.

***3. Events After the Shooting***

*A. Ebony's Testimony and Prior Statement*

Ebony testified that when she left the intersection she took a bus to a street called Murfield. While she was talking with members of the P. Stones, appellant walked up and joined the conversation. Someone told appellant, "You're the man." Ebony denied that appellant had a gun or that the white car was present when she was at Murfield. She and her girlfriends rode off on another bus, were stopped by police officers, and were taken to the police station for questioning. She said she had no problems thereafter with appellant or other members of the P. Stones.

During a pretrial interview with the prosecutor and the detective, Ebony said that while she was at the Murfield location, appellant and three other people got out of the white car. Appellant's companions said to him, "[M]an, you a man now[,] don't trip about it." Appellant pulled out the gun. The older gang members told him that he "did it right," and they were going to have a party for him. Appellant subsequently told her that he knew she had been talking with the police. She told him that she had not seen anything and was going to "disappear." He told her to do that. Since that time, people had given her messages from appellant, ordering her not to say anything. She explained during the interview that she was willing to provide information because appellant chose to enter the white car instead of leaving with her, he had been trying to get her beaten up for being a snitch, and she did not want to go to jail for withholding information.

*B. Testimony of Officer Rainey*

Officer Rainey drove back to the intersection when he heard the first broadcast about the shooting. He saw Brodis was on the ground and numerous police cars. He heard a second broadcast that described a white car like the one he had seen in the parking lot. He drove toward an area where he knew he was likely to find members of the P. Stones. About 15 minutes after the first broadcast, he saw on the road the same white car he had seen in the parking lot. Only the driver was inside it at that time.

*C. Testimony of Officer Murray*

Six days after the shooting, Officer Murray saw appellant walking on the sidewalk. Murray knew that appellant was wanted for murder. As Murray and his partner left their patrol car, appellant ran off. During the ensuing chase, appellant pulled a handgun from his waistband and threw it into a trash dumpster. He was taken into custody and the gun was recovered.

## DISCUSSION

***1. Failure to Instruct on Voluntary Manslaughter***

The jury was instructed that a finding of first degree murder could be based either on (1) a willful, deliberate and premeditated killing or (2) an intentional killing that resulted from the discharge of a firearm from a motor vehicle at a person who was outside of the vehicle.

The jury was given two possible grounds for a finding of second degree murder: (1) an unlawful intentional killing with malice but without premeditation and deliberation; and (2) an unlawful killing that resulted from an intentional act, the natural consequences of which were dangerous to life, that was deliberately performed with knowledge of the danger and conscious disregard for life.

The jury was also told that if it found "that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter," it "should consider the provocation for the bearing it [might] have on whether the defendant killed with or without deliberation and premeditation."

Appellant contends that the trial court should have instructed sua sponte on voluntary manslaughter as a lesser included offense. He contends there was evidence of provocation that could have led to a finding of voluntary manslaughter. He relies on Ebony's testimony that during the argument at the intersection, Rollin' 40's gang members told appellant that they killed his close friend Marcell, and there was nothing he could do about it. Ebony's testimony on that point was supported by Officer Rainey's testimony that this type of taunting was typical during gang confrontations. Appellant maintains that the evidence of taunting, directed toward a volatile 15-year-old boy, showed provocation that could make the killing voluntary manslaughter.

"On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense." (*People v. Cole* (2004) 33 Cal.4th 1158, 1215 (*Cole*).)

"[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).) Evidence is substantial for this purpose if it would cause a reasonable jury to conclude that the defendant committed the lesser but not the greater offense. (*Ibid.*)

"Voluntary manslaughter is a lesser included offense of murder. [Citation.] One form of the offense is defined as the unlawful killing of a human being without malice aforethought 'upon a sudden quarrel or heat of passion.' [Citation.] 'The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are viewed objectively. . . . "[T]his heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances," because "no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury

believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.'" [Citation.]" (*Cole, supra,* 33 Cal.4th at pp. 1215-1216.)

Here, there was no substantial evidence that would have caused a reasonable jury to conclude that appellant committed voluntary manslaughter and not murder. Ebony testified that Brodis was one of the people she saw making hand signs of the Rollin' 40's, she did not know if he was a gang member, and she knew the people who taunted appellant were members of the Rollin' 40's gang. We therefore must conclude that Brodis was not one of the people who taunted appellant about the murder of appellant's friend Marcell. Provocation requires provocation by the victim. (*Cole, supra*, 33 Cal.4th at p. 1216; *People v. Steele* (2002) 27 Cal.4th 1230, 1253.) There was no such evidence here.

Moreover, even if Brodis had engaged in the taunting, provocation "has nothing to do with intent and everything to do with circumstances, specifically, whether the circumstances would have caused a reasonable person to act as defendant did." (*Cole, supra,* 33 Cal.4th at p. 1211.) A reasonable person would not have responded to the taunting at the intersection by driving around looking for someone to shoot. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144 [passion for revenge does not reduce murder to manslaughter]; *Breverman, supra,* 19 Cal.4th at p. 163 [the requisite passion aroused by provocation cannot be revenge].)

Also, "'if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter.'" (*Breverman, supra,* 19 Cal.4th at p. 163, quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 327.) The taunts about Marcell at the intersection occurred prior to the gang fight, the arrival of the white car in response to cell phone calls, and appellant's driving around in the white car. The lapse of time between the claimed provocation at the intersection and the shooting of Brodis negated the possibility of voluntary manslaughter.

We therefore conclude that the trial court did not err when it failed to instruct on voluntary manslaughter based on provocation.

***2. Failure to Instruct on Second Degree Driveby Murder***

Appellant contends that the trial court should have instructed that a driveby shooting could be second degree murder and did not necessarily have to be first degree murder.

As indicated, the jury was instructed that it could base a finding of first degree murder either on a willful, deliberate and premeditated killing or on an intentional first degree driveby murder. The latter form of first degree murder is defined in section 189 as "any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle *with the intent to inflict death.*" (Italics added.) As is apparent from the statutory language, intent to kill is a requisite element for first degree driveby murder. (*People v. Chavez* (2004) 118 Cal.App.4th 379, 385.)

CALJIC No. 8.25.1, the instruction on first degree driveby murder, stated: "Murder which is perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle when the perpetrator specifically intended to inflict death, is murder of the first degree. [¶] The essential elements of driveby murder are: [¶] 1. The defendant committed the crime of murder; [¶] 2. The defendant perpetrated the murder by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle; and [¶] 3. The defendant specifically intended to kill a human being."

Under the right facts, a killing that results from a driveby shooting can occur in the context of second degree murder and not first degree murder. The applicable statute, section 190, subdivision (d), penalizes a killing that "was perpetrated by means of shooting a firearm from a motor vehicle, intentionally at another person outside of the vehicle *with the intent to inflict great bodily injury*." (Italics added.)

Section 189 describes a substantive crime, intentional driveby first degree murder. Section 190, subdivision (d), formerly subdivision (c), provides for an enhanced penalty, compared to other second degree murders, where the defendant committed a second

degree murder that involved a driveby shooting with intentional infliction of great bodily injury. (*People v. Garcia* (1998) 63 Cal.App.4th 820, 832.)

The pertinent instruction in the context of second degree murder is CALJIC No. 8.35.2.[4] Appellant contends that CALJIC No. 8.35.2 should have been given here.

If the facts involve a driveby murder, a finding of second degree murder is "theoretically possible if, for example, the jury [could find] that [a] defendant did an act dangerous to human life (shooting), but did not find the elements of intentionally shooting at the victim and intending to kill." (*People v. Rodriguez* (1998) 66 Cal.App.4th 157, 163, fn. 2.) However, such a finding was not possible on the facts here. Appellant was in the passenger seat of the white car that came out of the alley and turned in the direction of the three boys who were standing on the sidewalk. He shot Brodis in the heart, from 12 feet away. The method of shooting established that appellant acted with the intent to kill and not the intent to commit great bodily injury. We therefore conclude that, on the facts of this case, there was no evidence to support an instruction that the driveby murder could be second degree murder and not first degree murder.

Appellant also contends that under *Blakely v. Washington* (2004) 542 U.S. 296 the jury should have been asked to decide whether the killing occurred with the intent to kill or the intent to inflict great bodily injury. Assuming arguendo that the issue was not waived for lack of an objection on that ground below, it lacks merit because (1) there was

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[4] CALJIC No. 8.35.2 states: "It is [also] alleged in Count[s] ____ that defendant[s] perpetrated a murder by means of shooting a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict great bodily injury. [¶] If you find the defendant[s] guilty of second degree murder, you must determine whether: [¶] 1. The murder was perpetrated by means of shooting a firearm from a motor vehicle; [¶] 2. The perpetrator intentionally shot the firearm at another person or persons outside the vehicle; and [¶] 3. The perpetrator, at the time [he] [she] shot the firearm, specifically intended to inflict great bodily injury. [¶] . . . [¶] 'Great bodily injury' means a significant or substantial injury. [¶] You will include a finding on this allegation in your verdict using a form that will be supplied for that purpose. [¶] The People have the burden of proving the truth of this allegation. If you have a reasonable doubt it is true, you must find it to be not true."

no evidence to support a finding that appellant had the intent to inflict great bodily injury and not the intent to kill; and (2) both of the theories the jury was given for first degree murder required intent to kill, so the verdict of first degree murder means that the jury necessarily decided that appellant acted with the intent to kill.

**DISPOSITION**

The judgment is affirmed.

FLIER, J.

We concur:

BIGELOW, P. J.

LICHTMAN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.